

Legality of Sterilization: A New Outlook*

IN THE COURSE of a recent address to the Medical Society of London, Lord Justice Devlin showed that there is some judicial support for a more liberal view of the law relating to sterilization. The traditional view is that sterilization is forbidden by the law of criminal assault and its statutory variants, though it may be justified if performed in order to save life or health. Lord Justice Devlin said that sterilization, if done without consent upon a normal person, would be a criminal assault of a most wicked kind. He suggested, however, that an assault should not be treated as criminal if done either: (i) to avert danger to life, or grave and immediate danger to health; or (ii) with the consent of the other party and for a purpose not otherwise criminal. If it was thought that sterilization by consent should be prohibited except for grave medical reasons, this should be made a crime in itself and the law should not try to catch it as a form of assault (*The Times*, November 4th).

As a statement of what the law ought to be, Lord Justice Devlin's remarks will receive a very large measure of support from the legal and medical professions. It is problematic, however, whether this view is consistent with the actual state of the law on the authorities as they now exist.

New Opinions

The change in the wind of opinion over recent years has prompted the Medical Defence Union to seek fresh advice on the legality of sterilization. Leading and junior counsel have advised the Medical Defence Union on a joint opinion on the English law, and Scottish counsel have likewise

delivered a joint opinion on the Scottish law to the Medical and Dental Defence Union of Scotland.

For some time there has been little doubt that sterilization is lawful when performed on a consenting party for certain therapeutic reasons. Both English and Scottish counsel, in the opinions now received by the Defence Unions, go further than this. However, they confine their opinions to considering the case where there is full and valid consent to the operation by the patient concerned. They do not attempt to explore the difficult and interesting questions surrounding a purported consent given by a person of unsound mind¹ or by an infant. (Consent by an infant under sixteen would almost certainly be invalid: consent by an infant between sixteen and twenty-one may or may not be invalid,² but it would generally be inadvisable to rely upon such consent in cases of this sort.) With this limitation of scope in mind, it is possible to summarize the pith of the English counsel's opinion as follows: An operation for sterilization is not unlawful whether it is performed on therapeutic or eugenic grounds or for other reasons, provided there is full and valid consent to the operation by the patient concerned. This proposition, however, has no direct judicial authority to support it, because it has never been tested in the courts. The first case to come before a court would be in the nature of a test case and would establish a precedent of the utmost significance. Although confident that the courts would uphold the legality of a sterilizing operation performed on therapeutic or well-founded eugenic grounds, counsel are of opinion that the risk of an adverse finding increases as the reasons for the operation are medically less well-founded.

The Scottish counsel summarize their opinion

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of the position in Scottish law in these words:

We have formed the opinion that, if a sterilization were performed with the full consent of the patient by a responsible surgeon and if the reason for doing it was substantial and not obviously immoral by present-day standards, it is exceedingly improbable that the Court would hold the act to be criminal.

SUMMARY OF ENGLISH OPINION

Many earlier views of the law on sterilization expressed opinions formed by analogy from the law of abortion. The English counsel, however, eschewed such analogy and reasoned from first principles. The question facing them was whether an operation for sterilization was of itself a criminal act of such a quality that it was not rendered lawful by the consent of the patient upon whom it was performed.

Counsel first cleared one difficulty away by stating their view that all operations for sterilization fell into the same legal category notwithstanding any variety in technique.* in principle there was no distinction between an operation which involved breaking of the skin and one which did not.

Offences Against the Person Act, 1861

Apart from abortion, which was specifically forbidden by statute, a surgical operation could only be criminal in so far as it constituted either wounding, or the infliction of bodily harm, or an assault. What status had the patient's consent in the jurisprudential analysis of these crimes? Was it true that every surgical operation was *prima facie* lawful until shown otherwise, the operation only being a criminal offence if some extraneous criminal ingredient appeared in a particular case? Or was the converse proposition to be preferred—namely, that every surgical operation was *prima facie* unlawful, only ceasing to be an offence in any particular case if a "just cause" or "lawful excuse" appeared? These crimes were codified in the Offences Against the Person Act, 1861, from which the vital extracts were as follows:

SECTION 18: whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person . . . with intent to. . .

SECTION 20: whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm. . .

SECTION 47: . . . assault occasioning actual bodily harm. . .

In counsel's view no offence would be committed under Section 47 unless consent was absent, as Section 47 dealt with assault. They considered, however, the question whether the surgeon committed an offence against Sections 18 or 20 notwithstanding the consent of the patient to sterilization. The ingredient common to these sections was the infliction of bodily harm. Sections 18 and 20 both contained the qualification "unlawfully and maliciously," and Section 18 required that the infliction was made "with intent." "Maliciously" there meant the intention to do the particular kind of harm done. "Unlawfully" meant, in the words of Stephen J., "forbidden by some definite law"³—that is, not an act which was merely immoral. In general, no onus of proof rested on the accused. It might be said that, to show the act to be unlawful, *either* the prosecution must prove that the act by reason of the circumstances was "unlawful" *or* the prosecution must prove that the accused had no lawful excuse: which of these alternatives was the correct one depended on the question whether a surgical operation was or was not *per se* a criminal act.

What is a Crime?

To answer this question, counsel considered the basic question of what constituted a crime. The basic rule of English law,[†] subject to very few exceptions was that nothing was a crime unless it was plainly forbidden by law. Analysis of this principle was usually divided into analysis of the *actus reus* (forbidden act) and of the *mens rea*. The modern view of the *actus* was that, to determine whether it was *reus*, one must look at the surrounding circumstances (e.g. the allegation that A had killed B did not of itself aver an *actus reus*: the killing might be lawful execution). On this view, said counsel, the allegation of the cutting of skin by a knife did not of itself aver an *actus reus*. There was, however, a much older form of analysis which divided forbidden acts into those which were

* But see below under "Comment". The possibility of a reversal operation might be important.

† But not of Scottish law.

mala in se and those which were *mala prohibita*.⁴ Acts *mala in se* were "unlawful in themselves", while acts *mala prohibita* were merely forbidden. One could not give an effective consent to an act *malum in se*. If surgical operations were *mala in se*, consent was irrelevant, and the only question was whether there was lawful excuse for it. The *malum in se* test had been relied upon in modern times in *R. v. Donovan*,⁵ a case of indecent sadistic assault upon a consenting person. But this case could be distinguished as applying only to its own facts. In any case, a surgical operation would not fall within the category of *malum in se* as described in that case.

"Bodily Harm"

Turning from the meaning of "unlawful," counsel considered the meaning of "bodily harm" in the sections referred to. They doubted whether a surgical operation properly performed could be said to cause "bodily harm," grievous or otherwise. Grievous bodily harm need not be permanent or dangerous, but it must be such as seriously to interfere with comfort or health.

In counsel's view, the *actus* of a surgical operation (except for the special case of abortion) was only *reus* if there was some ingredient additional to the circumstances of a bona-fide surgical operation—e.g. a personally criminal (in the sense of a morally reprehensible) motive on the part of the doctor so that the surrounding circumstances had a criminal colour. Hence a surgical operation (including a sterilizing operation) properly performed was by itself neither an act *malum in se* nor an *actus reus*. For the same reasons, a cosmetic operation was lawful, though not necessary for the life or health of the patient.

Importance of First Case

There was no direct authority to support this view, but counsel took encouragement from the views of Lord Evershed and Hodson L. J. in *Bravery v. Bravery*,⁶ a matrimonial case, in which they expressly dissociated themselves from the observations of Denning L. J. regarding the position of sterilization in the criminal law.*

Counsel's reasoning made no distinction

between eugenic sterilization and sterilization performed for other reasons such as personal convenience. However, it would be more difficult to argue the first test case on obviously unmeritorious facts.

SUMMARY OF SCOTTISH OPINION

Scottish counsel, in considering the Scottish law, gave as their opinion that the carrying out of sterilization upon a consenting patient by a qualified person was not *per se* a crime and would not necessarily be held to be a crime (even though the sterilization was not necessary for the preservation of life or health), so long as the circumstances surrounding the doctor's conduct and particularly the motive for which the treatment was carried out were not such as to be plainly offensive to the public conscience or contrary to the public interest. It was commonly agreed that, in general, sterilization without consent in all probability would be a crime and that sterilization with consent where necessary for the preservation of life or health in all probability would not be a crime.† Accordingly, counsel considered only the case where consent had been given, but the justification of necessity for life or health of the patient was absent.

Absence of Evil Intent

In Scottish law, surgical operations *per se* were not, in counsel's opinion, *prima facie* criminal acts, and in particular were not *per se* assaults. Whether in any particular case a surgical operation was an assault and therefore criminal depended entirely upon circumstances, one of the most important of which was the presence or absence of consent. It was essential in the Scottish law of assault that there should be some evil intent against, and some "attack" upon, the victim:⁷ in the normal surgical operation these elements were clearly absent and there was thus no *prima facie* criminality which the practitioner need rebut by showing justification (or in English terms "lawful excuse").

It has been argued previously by Scottish lawyers that consent of the patient to sterilization would not itself render the operation legal. Such

* Both Denning and Hodson L.JJ. have now been elevated to the House of Lords.

† The position is the same in English law.

lawyers taking this view had relied upon *H.M. Advocate v. Rutherford*.⁸ This case decided that consent of the victim was no defence to a charge of murder. In counsel's opinion this was not a proper analogy, as in Scottish law the taking of human life was a crime in itself and consent could not excuse it, but, in counsel's view, a surgical operation was not of itself a crime, and hence the question whether consent provided "justification" or "excuse" did not arise. Counsel also, like their English counterparts, rejected the analogy of abortion. Further, they considered that the conduct in question in *R. v. Donovan* would not be held to constitute the crime of assault in Scottish law (though it might be criminal because of the element of indecency).

Power to Discover New Crimes

So far, Scottish counsel were in agreement with the opinion given by English counsel, and also had so far covered much of the same ground, as the Scottish issue of assault included most of the criminal acts covered by Sections 18, 20 and 47 of the Offences Against the Person Act, 1861, an Act which did not apply in Scotland. Consideration of Scottish law, however, had to go further, since there was no fixed calendar of crimes in Scotland. The Scottish Supreme Criminal Court had a general inherent power to discover and punish new crimes which was quite contrary to English legal thought. It was thus difficult for a Scottish lawyer to assert with confidence that any particular conduct, which might possibly be thought shocking to the public conscience, would not be held to be a crime. The difficulty was increased by the absence of any satisfactory definition of "crime" in Scottish law, beyond statements to the general effect that the conduct in question must be "anti-social" by current standards. In counsel's opinion, however, the court would be most reluctant to declare a new crime, and would only do so in regard to conduct which was clearly antisocial. In their view such an act would have to be one involving one or other of three elements: (a) harm or hurt done to another against that other's will; (b) a damage to the public interest in a fairly direct sense; or (c) a very clear element of moral turpitude. Where the patient consented, "(a)" was not applicable.

In some cases there was a clear element of moral turpitude and damage to the public interest (e.g. sterilization of a prostitute for the convenience of her trade). In cases of sterilization for the convenience of an ordinary person, it would be difficult to aver damage to the public interest, and in eugenic sterilization even more difficult.

COMMENT

The practical position in both the English and Scottish law is that a surgical operation is generally not a crime if performed with the consent of the patient. (Sometimes, as in cases of emergency, consent may be implied.) However, the performance of some operations is harmful to the public interest, and the State through the criminal law deprives any purported consent to such operation of any validity in public law (though such consent would generally bar an action for damages at civil law.) The effect of such a provision on its own would be to make the operation in question totally illegal. The State, however, mitigates this effect by saying that, although the surgeon cannot rely on the patient's consent for immunity from criminal penalties, yet if he has that consent and there are also circumstances in which the individual interest (in life or health) may legitimately override the public interest the operation is lawful.

An Undecided Question

The oracles of the Common Law and of Scottish Law have not yet disclosed whether the operation of sterilization is considered in itself harmful to the public interest. But if it is contrary to the public interest there are undoubtedly circumstances in which that public interest takes second place and the operation can legally be performed to avert danger to life or health. Both the opinions now obtained by the Defence Union support the view that according to English and Scottish law the operation of sterilization is not of itself harmful to the public interest and the patient's consent is sufficient warrant for the operation. However, it is considered that in Scottish law this must be read subject to the proviso that any elements of immorality attached to the operation would make it criminal.

The state of the law on this subject is such that no one can say with certainty what it is. Our courts will not answer questions put to them on hypothetical facts. The rulings of Common Law and Scottish Law can only be discovered by test cases on operations actually performed, and the state of the authorities is such that the courts have almost a free hand in deciding the law. The pitfalls are numerous and any aspirant hero would be well advised to take careful advice on the particular facts before operating. It will suffice to give one example of the sort of difficulty involved.

In considering an offence against Section 18 of the Offences Against the Person Act, 1861 (unlawful and malicious wounding), English counsel say, briefly, that sterilization is no offence under that section because the judicial definitions of the vital ingredients of that offence show that they do not appear in this operation. Thus: (a) "Unlawfully" means forbidden by some definite law, and there is no such definite prohibition of law relating to sterilization; (b) "Bodily harm" means serious interference with comfort or health, and sterilization does not inflict such harm; (c) "Maliciously" means only with intent to inflict the particular kind of harm done.

The prosecution might object as follows: As regards (b) and (c), depriving a person of a natural and normal ability must be an interfer-

ence with his health, and depriving a man of the power of procreation is as much an interference with health as amputating a healthy limb. Such an argument might be met by using a technique of sterilization which allows reversal. As regards (a), unlawful does not mean forbidden by some definite *criminal* law: indeed, in the case cited,³ Stephen J. held an act to be unlawful because forbidden by matrimonial law. It is clear that, in some circumstances, sterilization of one spouse without the consent of the other may amount to cruelty and so be forbidden by matrimonial law.⁶ Hence, if an operation of sterilization is such that it would constitute matrimonial cruelty on the part of the patient, it may well be that the surgeon performing it commits an offence against section 18 of the statute.

Whatever may be the law on sterilization, it is clearly most desirable that the courts or Parliament should now declare it.

REFERENCES

- 1 *Vide* Williams, Glanville, *The Sanctity of Life and the Criminal Law*. 1957. Faber. Pp.108-9.
- 2 Addison, P., *Brit. Med. J.*, 1960, 1, 976.
- 3 *R. v. Clarence*, 1889. 22 QBD 23 at p. 40.
- 4 *Blackstone's Commentaries*. 1766. 2nd ed. Clarendon Press. Pp. 54-58.
- 5 1934. 2 K.B. 498.
- 6 *Bravery v. Bravery* 1954. 3 All E.R. 59.
- 7 *Alison's Principles of the Criminal Law of Scotland*. 1832. William Blackwood. Vol. I, p. 175.
- 8 1947. J.C. 1.